Borun Brothers, Incorporated, a wholly owned subsidiary of Thrifty Corporation *and* Teamsters, Chauffeurs, Warehousemen and Helpers Local Union No. 533, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America

Borun Brothers, Incorporated, a wholly owned subsidiary of Thrifty Corporation *and* Evelyn Gaston. Cases 32-CA-2105, 32-CA-2639, and 32-RC-836

July 24, 1981

DECISION AND ORDER

On January 21, 1981, Administrative Law Judge Joan Wieder issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the General Counsel filed a statement in partial opposition to Respondent's exceptions.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge and to adopt her recommended Order, as modified herein.[2]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Borun Brothers, Incorporated, a wholly owned subsidiary of Thrifty Corporation, Sparks, Nevada, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Substitute the following for paragraph 1(d):

"(d) Promulgating and maintaining an invalid no-solicitation/no-distribution rule, and applying it in a discriminatory manner."

2. Insert the following as paragraph 1(e) and reletter the subsequent paragraph accordingly:

"(e) Discouraging membership in or activities on behalf of Teamsters, Chauffeurs, Warehousemen and Helpers Local Union No. 533, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or any other labor organization, by discharging employees or discriminating against them in their hire or tenure."

3. Substitute the following for original paragraph 1(e):

"(f) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act."

4. Substitute the attached notice for that of the Administrative Law Judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

The Act gives employees the following rights:

To engage in self-organization

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To engage in activities together for the purpose of collective bargaining or other mutual aid or protection

To refrain from the exercise of any or all such activities.

WE WILL NOT threaten you with reduced wages and benefits and other reprisals for engaging in concerted protected activity in the

[1] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing her findings.

The Conclusions of Law section of the Administrative Law Judge's Decision recites a violation of Sec. 8(a)(5) to which both Respondent and the General Counsel except. The complaint contains no allegation of a refusal to bargain and there was no testimony taken on that issue nor findings of fact made. The 8(a)(5) violation appears to have been included erroneously and par. 7 will therefore be deleted and the subsequent paragraphs renumbered accordingly. We also amplify Conclusion of Law 3 to include the words "promulgating and" immediately before "maintaining in effect an unlawful no-solicitation/no-distribution rule," in accord with the complaint.

[2] The Administrative Law Judge included a broad order at par. 1(e). We substitute a narrow order in accord with *Hickmott Foods, Inc.*, 242 NLRB 1357 (1980), and in accord with the corresponding paragraph contained in the notice. Also, par. 1(d) of the Order is corrected to conform with the Administrative Law Judge's Conclusion of Law 3, as amplified.

The Administratrive Law Judge inadvertently (sec. II, par. 16) referred to Dennis as having attended the August 21 counseling session. Dennis did participate in counseling Watts on March 12 and 13 of the following year.

We agree with the Administrative Law Judge's findings sustaining the objections to the election and adopt her recommendation to set aside the election. Accordingly, we shall remand Case 32-RC-836 to the Regional Director for purposes of scheduling and conducting a second election at an appropriate time.

We have conformed the Administrative Law Judge's recommended Order and notice.

event a union becomes your collective-bargaining representative.

WE WILL NOT coercively interrogate you about your union activities, sympathies, or desires.

WE WILL NOT poll you about your desire to be represented by a union.

WE WILL NOT engage in surveillance or create the impression that we have your union activities under surveillance.

WE WILL NOT promulgate and maintain an invalid no-solicitation/no-distribution rule and apply it in a discriminatory manner.

WE WILL NOT discourage membership in or activities on behalf of Teamsters, Chauffeurs, Warehousemen and Helpers Local Union No. 533, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or any other labor organization, by discharging employees or discriminating against them in their hire or tenure.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL rescind and expunge from our personnel or other records the written warning issued to Jeannie Marie Watts, and all reports or other references to any other alleged violations by Jeannie Marie Watts, Stephen Tarantino, and Robert Gilbert of our "solicitation and distribution" rule or to any counseling sessions we had with other employees concerning this rule.

WE WILL cease reprimanding or disciplining employees for violations of our no-solicitation/no-distribution rule, and discriminatorily enforcing the rule so as to unlawfully interfere with our employees' rights to solicit on behalf of a labor organization.

WE WILL, if necessary, reimburse Robert Gilbert and Stephen Tarantino for any wages not yet reimbursed as a result of their discriminatory discharges, plus interest.

BORUN BROTHERS, INCORPORATED, A WHOLLY OWNED SUBSIDIARY OF THRIFTY CORPORATION

DECISION

STATEMENT OF THE CASE

JOAN WIEDER, Administrative Law Judge: These consolidated cases were heard at Reno, Nevada, on July 8 and 9, 1980,[1] pursuant to charges filed by Teamsters, Chauffeurs, Warehousemen and Helpers Local Union No. 533, affiliated with International Brotherhood of Teamsters, Chauffuers, Warehousemen and Helpers of America, herein called the Union, in Case 32-CA-2105 on September 3 and amended on September 20; and, in Case 32-CA-2639; the charge was filed by Evelyn Gaston, an individual, on April 9, 1980, and was amended on April 25, 1980. A consolidated amended complaint was issued on May 28, 1980.[2] Objections to conduct affecting the results of a representation election were timely filed by the Union in Case 32-RC-836 which was consolidated, in part, with the unfair labor practice cases for hearing before an administrative law judge.

The amended complaint alleges that Borun Brothers, a wholly owned subsidiary of Thrifty Corporation, hereinafter referred to as the Company or Respondent, has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the National Labor Relations Act, as amended, herein called the Act.

Pursuant to a Decision and Direction of Election dated October 5, an election by secret ballot was conducted by the National Labor Relations Board on November 2, which resulted in 33 ballots cast for the Petitioner and 136 ballots cast against the Petitioner. There were 38 challenged ballots which were not determinative of the results of the election. On November 9, Petitioner timely filed objections to conduct affecting the results of the election. On December 31, the Acting Regional Director issued a Supplemental Decision and Order overruling certain objections, in whole or in part,[3] and, on March 7, the Regional Director, in a Second Supplemental Decision, issued an order consolidating Case 32-RC-836 with Case 32-CA-2106 for the purpose of hearing, ruling, and decision by an administrative law judge on the issues raised in certain of Petitioner's objections[4] and in the complaint in Case 32-CA-2105. No exceptions were filed to the Supplemental Decision or to the "Second Supplemental Decision, Order Consolidating Cases and Notice of Hearing."

The objections, as here pertinent, are coextensive with the alleged unfair labor practices with the exception of Objection 9, which claims that Respondent unlawfully and materially misrepresented the union-employee relationship at times calculated to preclude the Union from having an opportunity to reply effectively. The coextensive allegations include claims of unlawful surveillance or impression of surveillance, interrogation, and/or polling of employees regarding their union membership, activities, or sympathies,[5] unlawful threats of discharge or

[1] Unless otherwise indicated, all dates herein refer to the year 1979.

[2] The complaint was also orally amended at the hearing.

[3] Objections 4, 7, 8, 10, 12, 13, 14, 15, 18 through 22, and 23 were over ruled in their entirety and Objections 5 and 6 were overruled in part.

[4] Objections 1, 2, 3, 9, 11, 16, 17, 24, and those parts of Objections 5 and 6 relating to the discharge of employees Tarantino and Gilbert.

[5] Objection 1 to the election also contends that the Company permitted a third party to prescreen casuals and applicants for potential employment regarding their union sympathies and the Acting Regional Director for Region 32 found this objection raised issues of fact warranting a hearing. The complaint, as amended, does not include a similar allegation. It is assumed that the Union abandoned that portion of Objection 1 by virtue of its failure to adduce any evidence probative of the allegation and since it did not file a brief. Accordingly, it is recommended that this portion of Objection 1 be overruled.

other discriminatory activity because employees were engaging in concerted protected activity, the promulgation and maintenance of an unlawful no-solicitation/no-distribution rule which was discriminatorily enforced, the discriminatory discharge of Robert Gilbert and Steven Tarantino, and the discriminatory disciplining of Jeannie Watts. Respondent denies interfering with the conduct of the election as alleged in the Union's objections and also denies violating Section 8(a)(1) and (3) of the Act.

All parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine the witnesses, to argue orally, and to file briefs. Briefs, which have been carefully considered, were filed on behalf of the General Counsel and the Company.

Upon the entire record of the case, and from my observation of the witnesses and their demeanor, I make the following:

FINDINGS OF FACT

I. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

Respondent is a wholly owned subsidiary of Thrifty Corporation which is a California corporation engaged in the sale and distribution of merchandise within the States of Nevada and California.[6]

In March 1979, the Company opened a new warehouse in Sparks, Nevada, and then commenced staffing the facility. All the hourly paid employees who testified herein were employed as forklift drivers. In May, the warehouse opened for business. Also in May, the Union commenced its organizing campaign.

The Company experienced difficulty in commencing operations; initial conditions were described as poor, and at times the warehouse was "totally inoperable." In addition to permanently assigned supervisors, Respondent temporarily assigned supervisors from other locations to the warehouse to assist in hiring, training, and other activities necessitated by the difficulties in launching a new warehouse and the exigencies such a new operation engenders in creating a functional facility. The uncontroverted evidence is that it takes about 1 year before a new warehouse becomes fully functional.

The parties stipulated or agreed that the following individuals were supervisors at the Sparks, Nevada, warehouse at the pertinent times: Gary Thompson, currently plant superintendent and the individual in charge of operations; Dennis Malamut, a division manager; Terry McConnell;[7] Robert Northcutt; Patrick Kennedy; Glen Mai; Dick Rowe; Rubin Salgatto; Jim Rau; Personnel Manager; Larry Dennis, Mulroony; and Bob Scurrah. Additionally, Bill D. Everett, labor relations representative for Thrifty, frequently traveled from Thrifty's corporate headquarters in Los Angeles, California, to the Sparks warehouse to assist local management and to take charge of the Company's efforts to defeat the Union's organizing activities.

Everett prepared, for distribution to the employees, a handbook entitled "Welcome to Thrifty." Some employees received the handbook at the time they were hired by the Company. The handbook contains the following solicitation and distribution rule:

> In order to help insure that you and your fellow employees are not disturbed at your working stations while on the job, it is therefore our policy that there be no distribution of literature, of a political or other nature, or solicitations of any kind *on Company time.* In addition, there shall be no solicitation or distribution of literature of any kind on the job by persons not employed at Thrifty. We request your cooperation and any activities of this sort should be reported to your Supervisor immediately. [Emphasis supplied.]

The handbook, under the heading general work rules, further provides:

> We have never felt it was necessary to have a set of strict and formal work rules for our employees since we like to feel you generally understand what we expect of you. However, in any organization of our size, it is necessary that certain rules and procedures be spelled out in writing. A copy of those rules will be given to you. Remember, it is very important that each of us follow the instructions of his or her supervisor in the good performance of work. Specific work rules will be discussed with you from time to time and we will expect you to adhere to them.
>
> Our type of business requires good cooperation and teamwork among all our employees. Give each other a helping hand when bottlenecks occur or when someone is absent and the workload is a bit heavier on certain jobs. In this way, all of our work will be easier.

B. *The Allegations, Events, and Objections Involving Jeannie Watts*[8]

1. The events occurring on or about June 5

Watts was employed on April 23 as a stacker and 2 weeks later became a forklift driver. On or about June 4, Watts and several coworkers[9] were having lunch in Watts' van and listening to music when Thompson walked by. Watts jokingly invited him into her office and Thompson laughed, said no, not now, and continued on to his vehicle.[10]

Watts then avers that on June 5, as she was driving her forklift, Thompson stopped her, told her to park the

[6] Jurisdiction is not in issue. Respondent admits, and I find, that it meets the Board's $50,000 direct outflow standard for the assertion of jurisdiction. It is also admitted and found herein that the Union is a labor organization within the meaning of Sec. 2(5) of the Act.

[7] Counsel for Respondent represented that at the time of hearing McConnell was in a coma as a result of an automobile accident, and was unable to testify. Counsel for the General Counsel accepted this representation. Accordingly, no inferences will be drawn from the failure to call McConnell.

[8] The testimony of Watts refers to pars. 6(a), (b), (c), and (g), 7, and 8 of the consolidated amended complaint and Objections 1, 3, 5, 6, 9, 16, and 17.

[9] One coworker was Evelyn Marie Gaston.

[10] Thompson recalled the incident.

vehicle, bought her a cup of coffee, and met with her in his office.[11] According to Watts, Thompson stated that he wanted to talk to her about the union organizing campaign, that it was his understanding that authorization cards were being distributed from her van. Watts replied that the cards were not coming from her van, that she knew where they were coming from, but she would not tell Thompson the source. Thompson then asked if Watts did not think it would be better if the Union waited 1 year to ascertain how Respondent "was" before commencing an organizing campaign. Watts agreed that "it was rather early" to commence a union organizing campaign. Thompson then commented that the salaries were sufficient. Watts also avers that Thompson then stated that Nevadans were lower class people than Californians and did not "want" greater salaries. This comment assertedly angered Watts because her son was a native of Nevada; hence, she replied that she did not know about the Company's other employees, but she had taken a drop in wages to work for Respondent.

It is further claimed by Watts that Thompson then told her that the subjects they discussed "were to stay within the four walls, and that it was off the record, and that he wanted me to think about what the Teamsters were trying to do. And I told him that at a meeting that Mr. Everett had, he had told us to go [to] the union meeting, and hear what the Union had to say, and listen to their side. And I told him [Thompson] that I had done that."

Thompson stated that he became aware of Watts' activities on behalf of the Union in the latter part of June and recalled having a conversation with her around June 5. However, Thompson denies discussing the Union with Watts during that meeting and specifically denied her version of the conversation. Rather, Thompson claims that he attempted to get Watts to apply for a management position because he was very impressed with her capabilities. According to Thompson, Watts "expressed to me that she had no interest in it because I think her words to me were, 'This place is all screwed up.'" It is asserted by Thompson that he replied that it would take about 1 year to shake "all the bugs out of the place." Thompson further claims Watts also declined a management position "because her family history had been all organized labor, that she had relatives that were in organized labor, that was her whole bag, not management." Thompson testified that, at the time of this meeting, he believes he knew about the Union's organizing efforts but does not recall if he knew that authorization cards were then being distributed. Thompson believes he learned cards were being distributed sometime in early summer. Finally, Thompson stated that he first became aware of Watts' support of the Union's organizing effort when she began wearing a Teamsters T-shirt or hat in the latter part of June. Watts claims that she had applied for a managerial trainee position in June or July but was not given the advancement. Watts denies discussing the possibility of her becoming a manager at this meeting but does recall such a conversation at a later date, at the end of January or beginning of February 1980, in the presence of Malamut and Kennedy.

In late July, Watts started wearing to work, about twice a week, a shirt with the inscription "Go Teamsters" and a hat with the inscription "Local 533," and continued this practice until the election in November.

2. Events of August 1

On August 1, Malamut and McConnell told Watts that coworkers had complained that she was soliciting union cards "during working hours on July 30." According to Watts, Malamut did most of the talking, stating that it had been called to his attention by several employees that Watts had been soliciting union cards "on company time" which "was upsetting to them . . . . and that I [Watts] . . . or anyone that I talked to regarding the Union could be terminated." Watts states that "I told him, no way was I soliciting cards on Company time, that I knew my Federal rights." She explained later in her testimony that her Federal rights permitted solicitation during her breaks and lunch hour. She was then told to return to her job. There was no discussion regarding the issuance of a written warning, counseling notice, or other document at that time. Furthermore, the specific individuals complaining or the times, locations, or other details involved in the asserted violation of the Company's policy were not discussed.

Malamut's testimony was similar to Watts', stating that he informed her of complaints by employees but claiming that he informed her that she had been soliciting during working time, not company time. He also asserted that he asked Watts if she knew the company rules, and that she replied that it was the same as the Federal rule, that she could solicit during her break or during lunchtime. Malamut finally avers that he informed Watts that she could receive a written counseling notice for her activities. It is admitted that Malamut did not inform Watts which employees complained about her activities. The employees who complained about Watts did not testify.

3. Events of August 21

On August 21, 1979, Watts was again advised by two supervisors, McConnell and Bob Scurrah, that she violated the Company's no-solicitation/no-distribution rule. Scurrah, according to Watts, did most of the talking. Initially, he gave her a counseling notice[12] and requested she read it.

[11] It is unrefuted that Watts was not requested to punch out; hence, the meeting was during working time.

[12] The notice stated:

> Reason for counseling: Ms. Watts is the subject of several employee complaints regarding her active union solicitation during working time. The above mentioned employees describe her conduct as "Upsetting."
>
> What precisely was employee told? Ms. Watts was told that the company's "No Solicitation Rule" prohibits solicitation during working time, working time meaning the time actually spent performing employment functions. Ms. Watts was also told that further violations would result in her termination.
>
> Employee's comments and reactions: Ms. Watts denied that she was soliciting during company time and that the employees were approaching her about the union.
>
> What needs to be done to correct the situation? Ms. Watts must adhere to the company "No Solicitation Rule," therby [sic] refraining from union solicitation during working time.

Scurrah, according to Watts, then told her that Respondent had a no-solicitation rule which was contained in the "Welcome to Thrifty" pamphlet. Watts stated she had never received the pamphlet "and I didn't know that there was a no-soliciting rule. I took out my Federal rights from my apron, and put them on the table, and I told him that I know my Federal rights, that I could talk about the Union as well as baseball, football, and having babies . . . that my lawyer told me that, and he [the supervisor] told me that perhaps my lawyer should have my job." According to Watts, she indicated to Scurrah that her Federal rights allowed her to solicit during her break times, including lunch. It is unrefuted that Watts was not informed of the details of the complaints referred to in the counseling notice such as the time and place the alleged violations of the company's rules occurred or the coworkers involved. Watts asked to be permitted to confront the individuals that complained about her activities but the request was denied. Neither Scurrah nor the coworkers that were said to have complained that they were "upset" by her activities testified.

4. Events of March 12 and 13

On March 12, Watts came to work with about 50 copies of a newspaper article which discussed sexual harassment of employees. Watts asserted that she handed out four copies of the article prior to going to lunch and distributed additional copies during lunch as well as posting a copy on the bulletin board. The four copies handed out prior to lunch, Watts claims, were distributed while passing other employees and no work stoppages or conversations occurred. Watts' unrefuted testimony is that later in the day, Larry Dennis[13] called her into the personnel office, showed her a copy of the article, and asked if she had distributed the material; to which she replied in the affirmative. Dennis then inquired if she had any personal experience or knew of any experiences of sexual harassment, and she said no, that she only heard rumors in the warehouse about one of the supervisors. Watts was then informed that it was necessary to get permission prior to posting material on the bulletin board. Next Dennis inquired why she distributed the article and she stated she did not think there would be any repercussions from her actions, she did not consider her activity "a violation" of anything. Watts was informed that she would receive a counseling notice.

The following day, in the presence of Thompson and Dennis, Watts received the counseling notice.[14] Thompson informed Watts that Dennis was the best friend she had in the plant because he did not "take any action against her," but that this was the last and final warning, one more mistake and she would be fired.[15] Thompson also stated, according to Watts, "that the employees looked at her as a leader and that, as a leader, there is a price to pay."

Thompson then left the office and it is uncontroverted that Dennis told Watts "that he felt that I was being used by some of the people in the plant, and that I'd been had by the Union, and that that was off the record, and if Mr. Everett knew that he had said that to me, that he would be very upset."

Watts further testified that prior to the meeting she had never been told that it was necessary to receive permission prior to posting material on the bulletin board, and that no written instructions relative to this work rule were ever distributed to her or posted; to her knowledge the types of material posted on the bulletin board were items for sale such as cars, guns, furniture, and announcements of services offered by individuals such as babysitting.[16]

Respondent did not refute Watts' testimony that the employees do not punch in and out at breaktimes, only for lunch, during the workday.[17] It was stipulated by the parties that the employees are paid for their time on breaks. Furthermore, Watts testified, without contradiction, that during the summer of 1979 the plant was in chaos, there was more merchandise than storage space which often[18] resulted in the forklift drivers being told to wait at a particular place for various times, as short as 2 or 3 minutes up to 10 and, occasionally, 20 minutes each, depending how many drivers were delivering merchandise at the time to one particular area. The drivers were not instructed to perform any other work duties while waiting and they were not precluded from general conversation. During these periods of waiting, when supervisors were present, the employees were never instructed to be quiet or stop talking, nor were the employees told that only certain subjects could be discussed.

In addition to the generalized operating pattern during the summer discussed above, Watts detailed several specific incidents where both hourly employees and supervisors engaged in nonwork related activities during working time. In September, shortly after punching in, Terry McConnell held a meeting of all employees present at the warehouse to discuss a company picnic. In October, Thompson announced over the public address system that there would be a Halloween costume party in the

[13] Dennis did not testify.

[14] This notice read:

> Reason for counseling: Mrs. Watts active solicitation of hand out information to other employees without first asking a management evaluation. As to the time lost for employees excepting this information Mrs. Watts gave no consideration.
>
> What precisely was employee told? Mrs. Watts was told that the company has a "NO" Solicitation rule for the second time. First time being 8-1-79. Also that the company can and will not tolerate these continuous self motivated decisions.
>
> Employee's comments and reactions? Mrs. Watts freely admitted to distribution of public published literature and freely admitted to having given no thought to the time the company would lose as to the time lost in reading it or handing it out stating only that she thought all women should see it.
>
> What needs to be done to correct the situation? An immediate and sufficient improvement in conduct will be required, or further disciplinary action will be taken including termination.

[15] Thompson did not dispute the accuracy of Watts' version of the meeting.

[16] Gaston, a coworker, testified without contradiction that she was never informed of a rule requiring the receipt of permission prior to posting material on the bulletin board.

[17] Initially, Respondent attempted to have the employees punch out at breaktime, but the lines were so long that the mechanics of the operation took longer than the time allotted the employees for their breaks.

[18] Watts' estimation is uncontroverted and is credited.

lunchroom on October 30 and prizes would be awarded. The employees did wear costumes to work on October 30, the party was held and, after the normal lunchtime, prizes were awarded for the best costumes in four categories. Another incident related by the witness involved another public announcement by Thompson, in early 1980, during working time, regarding the solicitation of contributions for two employees who were involved in an automobile accident, to the effect that these employees were not eligible for coverage under the insurance policy; hence, a coffee can would be placed on the desk of the security guard[19] if anyone wished to donate money. The can remained at the guards' desk for several days.

Both Thompson and Everett testified about the solicitation of contributions for the employees injured in an automobile accident. Thompson believed such solicitations were consistent with company policy and historically had been permitted at other company locations were he had previously worked. Everett informed Thompson, upon hearing of the solicitation, that such activity fell into a "grey area." Thompson was not directed to remove the coffee can or subjected to any discipline, but removed the coffee can in response to Everett's comment. The coffee can had been at the guards' desk 3 or 4 days prior to Everett's comments to Thompson regarding the possible impropriety of this solicitation.

Other incidents Watts testified to relative to the solicitation-distribution rule included the distribution of a cartoon on March 25, during working time in the presence of Jim Rau and Glen Mai[20] and two hourly employees who were laughing. During October, Watts received an invitation from a coworker to a party during working time in the presence of Jim Mulroony and three other hourly employees. Mulroony, a supervisor, was standing approximately 8 or 10 feet away from her and observing the incident from a position above the location of the incident. Mulroony did not testify and Respondent did not present any other evidence refuting Watts' description of the incident. Also, in the latter part of April, Thompson announced during working time that there would be a picnic and Bill Buchanan[21] would accept donations for the picnic. Thompson acknowledged that Buchanan utilized the public address system to solicit donations for beverages for the picnic which was the means chosen by the baseball team to raise money for the purchase of uniforms. The Company sponsors the baseball team. According to Thompson, hourly paid employees are not allowed to use the public address system which is normally utilized for work-related announcements or company-sponsored activities, such as the baseball team. Employee requests to use the public address system for solicitations or other announcements unrelated to company-sponsored activities, Thompson alleges, have been consistently and routinely denied. The baseball team was considered a company-sponsored activity.

A further incident Watts recalled involved a birthday party for a supervisor, Rubin Salgatto, which was held in the breakroom, and began during breaktime but extended into working time. About 30 to 35 employees attended the party and monetary contributions were solicited from Watts by Peggy Wright, an hourly paid employee. No one else was present during this solicitation. Thompson knew there was to be a party for Salgatto during breaktime. Thompson's office was contiguous to the party site. Thompson asserts that he was not asked if the employees could solicit funds for presents or food to be distributed at this party. Salgatto did not testify. Therefore, the nature or extent of supervisory knowledge about solicitation for food or presents for the party was not placed in evidence. However, knowledge by the highest company officials is not a necessary finding in determining if Section 8(a)(1) of the Act were violated. See *Dover Garage II, Inc.*, 237 NLRB 1015 (1978), and *Montgomery Ward & Co., Incorporated*, 115 NLRB 645 (1956), enfd. 242 F.2d 494 (1957).

C. *The Events Involving Stephen Tarantino*[22]

Tarantino commenced employment with Respondent on May 14, 1979. Shortly thereafter, he became a forklift operator working on the receiving dock. In the middle of August, Tarantino began wearing hats bearing union logos daily until the day he was terminated, September 20, 1979. It is alleged that Tarantino's activities regarding the organizing efforts of the Union were observed by Respondent and became the basis for coercive interrogations and discharge.

1. Events of August 28 and 29

The first incident allegedly forming a basis for a violation of the Act, according to the General Counsel, occurred on or about August 28 when Tarantino attended a dinner party hosted by the Union at a restaurant located in a casino known as John Ascuaga's Nugget (Nugget) located in Sparks, Nevada. Tarantino saw Thompson at the Nugget that evening and they exchanged greetings. According to Tarantino, he considered Thompson's presence at the club mere coincidence. The following day, Tarantino asserts, as he was driving his forklift, Thompson requested Tarantino to stop work for a moment so that they could converse. Thompson inquired how many people were at the meeting the preceding evening to which Tarantino replied "a few." Thompson again inquired "how many," to which Tarantino claims he replied it was privileged information, that he could not talk

[19] The desk was located between the main entry and the warehouse area, which was not a working area for forklift drivers.

[20] It was stipulated by all parties that Jim Rau and Glen Mai were supervisors as defined in the Act. While Respondent disclaims knowledge by Everett or Thompson of these activities, there is no evidence that the Company or these supervisors, Rau, Mai, Thompson, or Everett, ever disavowed these activities or otherwise informed employees that such actions were improper. There was no showing that these activities were undertaken on behalf of the Company as a builder of morale, rapport, or other basis. See *International Association of Machinists, Tool & Die Makers Lodge No. 35, etc. [Serrick Corp.]* v. *N.L.R.B.*, 311 U.S. 72 (1940). This same reasoning pertains to the other supervisors employed by Respondent.

[21] Buchanan is an employee who is on the recreation committee. The recreation committee is composed of seven hourly paid employees and two supervisors including Thompson. They meet during working time and try to plan activities for the employees.

[22] Objections 1, 3, 5, 6, 11, and 16 and pars. 6(e), 6(f), 7, and 8 of the complaint.

about it on company time. Tarantino then states he drove off and returned to his job.

Thompson asserts that he frequented the Nugget with his wife because they were residing in a hotel or motel at the time and went out to the Nugget almost every evening Monday through Friday for dinner. Thompson does recall an incident with Tarantino on August 26, but his version is greatly disparate from Tarantino's. According to Thompson, Tarantino drove up to Thompson on his forklift and remarked, "A whole bunch of us saw you last night at the Nugget about half-lit." Thompson replied that he did not see anyone there, that he had not noticed any employees. Thompson did recall having a few drinks that evening and playing the slot machines and admitted to being "probably half-lit." Thompson does deny having knowledge of any employees' presence at the casino until Tarantino's comments and does recall asking Tarantino where Tarantino was sitting when he saw Thompson. Tarantino did not mention the employees included in the group that saw Thompson that evening nor did he state that there was a union meeting conducted at the Nugget. Thompson denies inquiring as to why Tarantino was there, stating that "the Nugget was about the only nice place in Sparks so it was frequented by both the employees and management of Respondent."

2. Events of September 10

Another incident allegedly violative of Section 8(a)(1) of the Act occurred in the early part of September, approximately on September 10. Tarantino claims that he requested a transfer to the night shift at a time he was in the personnel office and saw Gary Thompson. Tarantino avers that Thompson, after giving the form used to request a transfer to Tarantino, asked to speak to Tarantino, stating, "He told me not to misunderstand him, that he was curious for his own knowledge, as to what the Union had offered to do for us as the employees of the company." In reply, Tarantino assertedly inquired what the Company was doing for employees. Thompson was then said to have stated "that the Union couldn't do any better for us than they had done for anybody else in Nevada, and that it would result, if we went along with the Union, it would result in a loss of pay, or lowering of wages, and less benefits." After making this statement, the bell rang for coffeebreak and Tarantino told Thompson it was time for him to have his coffee and left. According to Tarantino, that was the extent of the conversation and it did not contain details such as discussions involving collective-bargaining negotiations or the methods employed by unions and companies to reach agreements in their contract negotiations.

Thompson did recall Tarantino inquiring if he could get a transfer to the late shift and stated that Tarantino gave as his reason that he wanted to get a second job which his then current assignment to the 7 to 4 shift prevented. According to Thompson, he represented that Tarantino told him that Tarantino located a job that he could work at in the morning and that if he could carry two jobs he could get himself out of debt. Thompson disclaimed knowing what the second job was to be but knew that Tarantino was a "slot machine mechanic or something to that effect." Thompson claims that he informed Tarantino that it was possible to get a change in shift because Tarantino was a good machine operator, that they did have late shift openings, and that he then suggested to Tarantino that he should put such a request in writing. Thompson denies handing Tarantino a transfer request at the moment because they were out on the floor of the warehouse but does believe that he referred Tarantino to the personnel office to acquire the requisite forms and to make his wishes for a transfer known at the personnel office. Thompson also denies discussing with Tarantino, at this time or at any other time, unions in general or Tarantino's specific union activity or proclivities. The discussion, assertedly, was of a strictly personal nature involving Tarantino's financial difficulties involving the repossession of his car and his furniture and the fact that his wife had left him and he needed extra money to cover legal fees, which were the matters necessitating the transfer to another shift to facilitate the procurement of a second part-time job and additional income. Specifically, Thompson denies telling Tarantino that the employees could not do any better with the Union and that if the employees did acquire union representation that they would lose pay and benefits. It is noted that Tarantino did not dispute discussing his financial or marital difficulties with Thompson.

3. Events of September 19 and 20

On September 19, Tarantino attended a hearing at the National Labor Relations Board involving objections to an election. Prior to attending the hearing he showed the subpena he received to attend said hearing to Personnel Manager Patrick Kennedy. At the objection to election hearing, McConnell was present as well as Dennis Malamut. The following day, September 20, Tarantino went to work and in the afternoon had occasion to go to the personnel office to inquire about a raise he felt was due and owing. He discussed the raise with Patrick Kennedy.[23] When leaving that day, Tarantino noticed that his timecard was not in the rack but it did not occur to him that he had a potential problem with his Employer because he had previously observed certain clerical employees remove timecards for personnel office purposes.

Later that day, he was paged and told to go to the personnel office. When he arrived at the personnel office, both Patrick Kennedy and Dennis Malamut were present. Malamut did most of the talking. Malamut said "that they had received several complaints about my union activity on company time, and that they felt that one complaint they would take with a grain of salt. Three or four complaints, they would tend to believe the allegation. Then they told me at that time they felt that they had no other alternative—no other recourse but to terminate me. And, I asked them, what was the reason—well, the actual reason. Who was accusing me of this? And I asked them to bring those people forward, so I could answer to their faces what was going on. And they said they didn't have to do that." According to Tarantino, he then inquired as to why he did not get a

[23] It should be noted that Patrick Kennedy did not testify. The reason for Kennedy's failure to testify was not explained.

warning. The supervisor indicated that the violation of the solicitation rule was one of several grounds they considered to be a basis for immediate termination. Tarantino then assertedly inquired why Jeannie Watts was warned for violating the solicitation rule and he was not accorded similar treatment. Malamut assertedly replied that he was not aware of the circumstances of Watts' case and asked Tarantino to step outside the office while he reviewed Watts' file. Tarantino stated he left the office and remained outside approximately 5 minutes. Kennedy, he believes, then asked him to reenter the office. Malamut then told him that the circumstances in Watts' case were different and they felt they still had to terminate him and that Kennedy would pay whatever money was due and owing. Malamut then left. According to Tarantino, he was interviewed prior to being hired by Malamut and did discuss the grounds for termination without a prior warning. According to Tarantino, Malamut stated that the company policy required the immediate termination for violations of rules regarding falsification of employment application, fighting, and stealing. Those are the only three grounds for immediate termination, according to Malamut, at the time of his employment interview. Union solicitation was not mentioned as a basis for immediate termination during the interview.

Tarantino did not deny that he had been soliciting during working time. Similar to Watts' testimony, Tarantino said that the operation of the warehouse was highly disorganized, that there would be many times when they would be stationary on their forklifts waiting for the resolution of a problem as to where they should take merchandise or where merchandise should be stacked. Tarantino estimated that, as a minimum, 10 times a day forklift drivers would be standing or sitting waiting for supervisors to decide what to do with particular merchandise; each time they would spend from 2 to 7 and 8 minutes awaiting such decisions. During these hiatuses in work, he was never instructed not to talk to other employees, nor was he ever told that there was a rule forbidding talking while he was going about his work. There was never a discussion or a listing of matters which were forbidden as subjects of discussion during working hours. Tarantino did not have an occasion to speak with supervisors about nonwork related subjects but he did hear such matters as company picnics being announced over the public address system; he recalled observing a party at the warehouse at which employees in the shipping area participated after breaktime. Upon his employment, Tarantino did receive a copy of the booklet entitled "Welcome to Thrifty," but he did not receive any oral or written statements concerning union solicitation other than the booklet nor did he receive any warnings or explanations regarding union solicitation.

In addition to counseling Watts on August 1, 1979, Malamut admitted that he was the individual who informed Tarantino that he was terminated on September 20. According to Malamut, he told Tarantino that the Company had received numerous complaints from employees that he was soliciting on behalf of the Union during times when he should be working and that the complaints stated that Tarantino was interrupting other employees during their working time. Malamut stated that he inquired if Tarantino knew what the Company's policy was regarding solicitation to which Tarantino replied in the affirmative and went on to explain that he could solicit at breaktimes, lunchtime, and before or after work. Tarantino, according to Malamut, stated that he might have possibly solicited during working time, "on company time." In contravention of Tarantino's testimony, Malamut specifically denied discussing with Tarantino the grounds for discharge from employment at Thrifty or talking about any work rules during his employment interview. He stated that he could recall very clearly Tarantino's interview even though he did interview "a couple of hundred prospective employees." It appears that what Malamut did mean was that he utilized a standard format during the interviews and that he could not remember Tarantino's interview word for word; rather, he followed the standard format.

According to Malamut, dischargeable offenses without prior warning include fighting, stealing, and falsification of the employment application. It is interesting to note that Malamut did not mention solicitation as a dischargeable offense without prior warning and that the factors listed by him during his testimony coincided with the factors Tarantino claims Malamut listed for him during the employment interview. However, Malamut specifically denies discussing with Tarantino or any other employee the specific standards of conduct at Thrifty. Malamut does not know of any documents that incorporate a list of the offenses the Company considered dischargeable offenses without prior warnings. Malamut stated that Everett establishes the company policy which is not in writing. It is noted that when describing the basis for Tarantino's discharge, Malamut used the term "company time" but claims that he told Tarantino that he was soliciting on working time and denies using the words "company time" when addressing the subject matter with Tarantino. It is also noted that only one employee complained about Tarantino's activities, contrary to Malamut's representation to Tarantino that he had received numerous complaints from employees. This misstatement of fact is one of the reasons Malamut's testimony is not credited.

Everett testified that he had a role in the termination of Tarantino. According to Everett, on or about September 19, Gary Thompson informed him that an employee named Diana Crabtree complained that Tarantino had been soliciting for the Union on "work time." Everett asserted that he told Thompson that if the allegation was supported by a written statement from the complaining employee it would be grounds for termination, but without such a written statement management could not do much about the complaint. The next day Everett stated he received a call from a supervisor named Brockerman[24] who stated he got a written complaint from the employee. The employee complaint was read to him. The employee complaint states, "On three separate occasions I witnessed, during *business hours* (Not on brakes [sic] or lunch, Steve Tarantino soliciting for the Union. Once approx. 1 week ago in A-1 and handing out union

[24] Brockerman did not testify.

sign-up card. Again right after in front of section 401 while on his fork-lift to some younger personel. Again yesterday the 18th, I witnessed this again. I don't know the names of the people he spoke to and did not hear anything. I only saw cards change hands and know they were talking." (Emphasis supplied.)[25] Based on Brockerman's disclosure of the contents of Crabtree's statement, Everett claims that he told Brockerman to terminate Tarantino. Everett also believes he made the same statement to Malamut. There was no explanation as to why Tarantino was discharged while Watts received warnings and retained her job.

D. *The Events Involving Robert Gilbert*[26]

Robert Gilbert did not testify. Everett testified that he made the decision to terminate Gilbert. The basis for the decision, according to Everett, was the receipt of a telephone call from Northcutt[27] in late August of 1979. Northcutt was at the time the temporary personnel director at the Sparks facility. Northcutt, according to Everett, informed him that Gilbert had been soliciting on behalf of the Union during working time which was the subject of an employee complaint. The complaining employee, Robert Bledsoe, was requested to give a written statement. Upon receipt of the written statement, Northcutt again telephoned Everett and read the statement supposedly written by Bledsoe concerning Gilbert. Bledsoe did not testify. The statement reads as follows:

> On the 28th of August at 2:30 in the afternoon I was waiting to get my forklift past an area in the warehouse that someone was trying to clear. Another machine was being delayed at the same time which was operated by a Mr. Robert Gilbert. While we were waiting I noticed Mr. Gilbert's cap he was wearing had an insignia on the front of it. I asked Mr. Gilbert the meaning of the insignia and he stated it was a local union which was in our area. He then made a gesture for me to be quiet because we were not allowed by the company policie [sic] to discuss the matter. Without anyone saying anything else to Mr. Gilbert he went on to say, I am bringing in an $8 per hour union in here, I've been working on it for some time. He then proceeded to state that he had information about some financial facts about the Thrifty Corp. saving some $30,000 a year by there [sic] building this warehouse in the Sparks, Nev. area which would more than cover any additional costs in wages that might be incurred by the addition of a union contract at our warehouse. These statements were made to me and two female employees who I can physically identify but do not know by name. At that point the aisle was cleared and I went about my work again. Later that day an Evelyn Gaston made a statement about her wages not being enough but that would soon change, there was no direct mention of the union but due to the fact she wears the same union cap I just surmised she was speaking of a union contract. The way Mr. Gilbert spoke of his interest in a union being brought in, I would say he has and will continue to make an untiering [sic] effort towards completing this goal. I am myself dead against any union being brought in and said that if you must be forced to listen to someone in regards to the union that your time on the job is not the place or proper time to do so, and therefore thought it would be in the best interests of myself and others to submit this information to the people in charge of this dept.[28]

It is noted that the letter does not contain any allegation that Gilbert distributed authorization cards or that he was soliciting signatures thereupon. Also, Bledsoe's letter was the only statement contained in the record that purports that Respondent had a rule which forbade discussing union matters during working hours. It is further noted that the discussion, according to Bledsoe, occurred during one of the previously described hiatuses in work occasioned by the confusion of starting up a new warehouse, a fact admitted by Respondent. Furthermore, there is no explanation as to why Gaston, who was mentioned by Bledsoe as having engaged in similar activity, was not similarly treated.

Everett stated that after hearing the rendition of Bledsoe's statement over the telephone he ordered Gilbert terminated, asserting he gave Northcutt the authorization to terminate Gilbert, telling him to call Gilbert and confront him with the allegation and, if Northcutt deemed it necessary, to terminate Gilbert.[29] The parties stipulated that prior to Gilbert's termination he received no written counseling or warning regarding the Company's no-solicitation/no-distribution rule. The parties further stipulated that Bledsoe received no discipline including a written counseling or warning notice arising out of the incidents referred to in his written statement even though he admitted in his written statement that he initiated the conversation.

Malamut testified that he did sit in on Gilbert's termination but did not see Bledsoe's complaint nor did he know that Bledsoe was the party that made the complaint which resulted in Gilbert's termination. All he knew was Gilbert was being discharged and he did not even know there was a complaint. Malamut further testified that Gilbert was considered a below average employee but stated that "he was not fired because of that." Everett had an occasion after the termination to see Gilbert and inform him that the basis for his discharge was violation of company policy, the no-solicitation/no-distribution rule.

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[25] It is noted that, contrary to Malamut's testimony and Tarantino's representation of the testimony, the complaint itself does not allege that the complaining party was interrupted during working hours or was prevented from working during working hours.

[26] Objections 5, 6, 15, and 16 and complaint pars. 7 and 8.

[27] Northcutt did not testify.

[28] It should be noted that the copy of the letter submitted in evidence was not extremely clear and therefore the above quote may not be entirely accurate.

[29] It was noted in the record that Everett's affidavit stated that, on hearing Bledsoe's written statement, Everett instructed Northcutt to terminate Gilbert, not to confront Gilbert with the material, and if necessary terminate him. This modification of prior testimony was not explained on the record. Furthermore, the failure of Northcutt to testify leaves the record devoid of evidence probative of the necessity to terminate Gilbert.

E. *The Events Involving Evelyn Marie Gaston*[30]

Gaston commenced employment with Respondent on May 11, 1979, and voluntarily ceased her employment on June 2, 1980. The first matter she testified to involves a meeting conducted by Everett in the latter part of August. Most of the warehouse employees attended the meeting and during the meeting Everett allegedly stated "that he knew who had signed the cards and that they could get fired for it." Gaston also averred that Everett stated that he "did not want any solicitation of union authorization cards, that the ban was not limited to specific locations or times of day, but was rather a general ban on solicitation of authorization cards. According to Everett, he held two meetings at the warehouse with the entire work force. The first meeting was held on June 1 and the other on August 24, 1979. He asserted that during these meetings he explained the no-solicitation/no-distribution rule to the employees. He claims that his explanation was that the Company wanted no solicitation and no distribution of any type on working time but that the employees were free to do what they wished during their breaks, lunch hours, or before and after work. Everett claims he further explained that, while they were on the floor working, the Company wanted no distribution or solicitation of any type. During the meetings, Everett avers, he gave the example of a Tupperware party or attempts to solicit authorization cards.

Another incident involving Gaston allegedly occurred after the election, on or about November 19. The incident involved a conversation with Thompson who requested that she get off her lift and talk with him. Also present, according to Gaston, was Jim Brockerman.[31] According to Gaston, Thompson initiated the conversation by stating, "[I]t had come to his attention from three warehouse employees that I was soliciting a petition against Thrifty for union activities." Gaston asserts that she responded by stating she did not know what he was talking about. Thompson then assertedly told her that she knew the consequences of such solicitation. Gaston claims she responded by informing Thompson that she did not know what he was talking about, that she knew her Federal rights and that Thompson knew what her Federal rights were. According to Gaston, Thompson did not explicate further regarding when she was supposedly soliciting or which employees complained. Thompson was present during Gaston's testimony and stated that he has no recollection of the incident related by her and definitely did not recall discussing with Gaston anything about unions or a petition to the "Labor Board," even though Gaston alleged that Thompson inquired about her activities of soliciting a petition against Thrifty after the election.

As previously indicated, she had never been informed about a management rule requiring prior permission from management before posting any material on the lunchroom bulletin board. Additionally, she claims she never heard of a company rule prohibiting employees from chatting with one another about matters not related to work during the course of their performance of duties within the warehouse. In fact, Gaston stated that she had many conversations with supervisors about matters unrelated to work during working time. One example she gave was conversations with her supervisor, Chuck Rice, about baseball. Gaston was on the Thrifty baseball team which induced many conversations with Rice, a baseball aficionado, about that subject. They had such conversations almost every time they saw one another which was about four or five times a day. Baseball was not the exclusive subject matter of their conversations; they discussed many different subjects.[32]

The General Counsel inquired of Gaston about an incident during the beginning of December 1979 which is characterized as illustrative of the type of discussions between supervisors and coworkers during working time about nonwork related matters, but is not alleged in the complaint to be a violation of the Act. The incident referred to by Gaston involved several coworkers and Supervisors Mulroony and Rau. As Gaston was dropping merchandise off at a specific section of the warehouse, she passed by Mulroony and two coworkers who were passing a little card around. The card was placed into evidence and was a card with a joke on it. She stopped and the card was handed to her. She briefly inspected the card and returned it. The incident occurred right after lunch during worktime. One employee involved in the incident was at her work station and the other one was about 25 feet away from her work station. It was stipulated that the personnel files of the Company were searched and that such search failed to produce the existence of any warnings issued to the individuals involved in the joke card incident. On the same day, Gaston saw the card in Jim Rau's possession. She saw Rau with the card during the afternoon on working time. Rau also presented the card to her in front of the receiving office. Rau wanted her to look at it so she grabbed the card, inspected it, and returned it to Rau saying she had already seen it. Rau did not say anything to her but was laughing, according to Gaston. Gaston did not receive any discipline for looking at the card. Thompson disavows any knowledge of Rau's and Mulroony's activities with regard to the card, stating the first time he had heard about it was when Gaston so testified. Thompson further testified that he had never been informed that a supervisor was distributing nonwork-related documents during working time. He did recall other incidents where nonsupervisory employees were accused of distributing nonwork-related material during working time which were made the subjects of investigations and, where appropriate, discipline was imposed. He speculated that if he had been informed that the supervisor was distributing nonworkrelated material during working time, a similar investigation would have been conducted and appropriate disciplinary action taken where warranted.

[30] Objections 2, 16, 17, and 24 and complaint pars. 6(h), 7, and 8.

[31] The parties did not explain Brockerman's absence from the hearing.

[32] It was stipulated by the parties that Chuck Rice was a supervisor within the meaning of the Act at the time the alleged events occurred. Rice did not testify.

F. *Everett's November 1 Speech*

Objection 9 alleges that Everett, during a speech given on November 1, 1979, made substantial and material misrepresentation of fact at a time calculated to preclude the opportunity for an effective reply. The speech was made on November 1, the day before the election. According to Watts, during the speech Everett held up a booklet which he represented to be the Union's constitution. It is averred that Everett claimed that the Union's constitution stated that if a member did not pay the union dues that the Union could confiscate the member's property even if the member had withdrawn from the Union and that the Union could confiscate an employee's home, leaving them homeless. The booklet held up was described as thick and comprised of white paper. Watts stated that Everett did not read from the booklet. The subject matter arose, according to Watts, because Everett stated it was the last and final time to talk to the employees before they voted and he wanted the employees to be knowledgeable about that particular article in the Union's constitution. She does not believe that he cited a particular article or provision that could be inspected. The meeting was conducted at 7 a.m. on November 1 with a majority of the warehouse employees in attendance. Watts does not recall if Everett had any notes with him. She just recalled the thick booklet that he referred to as the Union's constitution. Watts did not recall whether employees asked questions during the meeting but stated that she had never seen the Teamsters constitution or bylaws, just the constitution of Local 533.

According to Everett, during the November 1 meeting he did have a copy of the International's constitution in addition to some typewritten notes. He opened the meeting by reading two paragraphs from his notes and then informed the employees that he would like to read a few articles from the Union's constitution. Everett states that he read from the constitution verbatim and then briefly went over the material he covered with the employees. The meeting took about an hour. Everett informed the employees of where the election was to be held and the procedures followed in conducting the election. Everett says he urged the employees to vote, informing them their vote was secret and no one would ever know how they voted. It is also averred by Everett that he informed the employees that regardless of the outcome they were the Company's employees and that no employee, either prounion or antiunion, had any reason to fear retribution by the Company.

Everett stated that one of the portions he read dealt with the constitution's provisions pertaining to collection of dues, fines, and assessments.[33] Then, according to Everett, the employees asked questions such as when they would get results of the election to which he replied that the Board agent would count the votes at the close of the polls and that they probably would know who won by 6 or 6:30 that evening. Everett then informed the employees that they would keep someone on telephone duty in the event that employees wanted to telephone after 6:30 p.m. to ascertain the results of the election. He also stated that an employee inquired about the fines and assessments section that he read from the Union's constitution and he also inquired about how far the Union could go to collect moneys due and owing it, and he replied that they were collectible in a court of law and the Union could go to court to collect dues and fines and assessments. Everett did not recall who asked the question which was raised immediately after he read from the International constitution. He believes the employee inquired whether that section meant the employees could lose their homes and he believes he answered that under the article that dues, fines, and assessments were legitimate debts that were enforceable in a court of law and there were certain procedures the Union would have to go through. He stated it was possible they could eventually get a judgment in a court of law against the employees but he does not recall saying anything else. Everett does not recall saying anything about enforcement of judgments. Everett also cannot recall anything being said about confiscation of property.

II. ANALYSIS AND CONCLUSIONS

Respondent argues that the counsel for General Counsel has not proved the allegations by a preponderance of the evidence. The key to the resolution of most of the issues is recognized by the parties to be the question of the validity of the no-solicitation/no-distribution rule. Respondent contends that the term "company time" is not overly broad for it clearly refers to time which belongs to the Company; i.e., the time the employees should be working for the Company. Contrary to this contention, the Board has repeatedly found that the use of the term "company time" in a rule prohibiting protected activity is unduly ambiguous and overly broad, rendering the rule susceptible to interpretation that solicitation is prohibited during all business hours, which is unduly restrictive of the employee's rights protected by Section 7 of the Act, and hence is presumptively unlawful. See *Plastic Film Products Corp.*, 238 NLRB 135 (1978), citing *Florida Steel Corporation*, 215 NLRB 97 (1974), and *Stewart-Warner Corporation*, 215 NLRB 219

[33] The one portion read by Everett is art. XXVI, secs. 1 through 3, which provide as follows:

> Section 1. The provisions of this Constitution relating to the payment of dues, assessments, fines or penalties, etc., shall not be construed as incorporating into any union security contract those requirements for good standing membership which may be in violation of applicable law, nor shall they be construed as requiring any employer to violate any applicable law. *However, all such financial obligations imposed by or under this Constitution and local union bylaws (and in conformity therewith) shall be legal obligations of the members upon whom imposed and enforceable in a court of law.* [Emphasis apparently was supplied by Everett in the copy introduced into the record by Respondent.]

The two paragraphs read by Everett from a prepared speech state:

> During the times we have had our meetings together the one subject that I've not discussed with you is that of the Rules and Regulations adopted by the Teamsters and contained in their International Constitution. This is a document containing one hundred eighty-eight (188) pages which I would suggest that all of you who wish to become members of the Teamsters become familiar with before making your final decision. This document covers everything from the salaries of the International Officers to the election procedures for each Local and includes methods of dues, fines, assessments and other charges.

(1974). See, generally, *Fayetteville Industrial Maintenance, Inc.*, 218 NLRB 888, 889 (1975), and *Clinton Corn Processing Company, a Division of Standard Brands Incorporated*, 253 NLRB 622 (1980).

Respondent, citing *Essex International, Inc.*, 211 NLRB 749 (1974), asserts that its representatives cured the ambiguity of the company handbook by clearly conveying to employees its intent to permit solicitation during "working time, i.e. clock time other than break or lunch time." Everett testified that he explained the no-solicitation/no-distribution rule to Borun employees at two meetings, one conducted June 1 and the other on August 24. The evidence, rather than supporting the contention, demonstrates the existence of confusion among Respondent's representatives regarding the meaning of this rule. For example, in a letter to the Union, the Company's director of industrial relations, Everett, defined the rule as prohibiting solicitation during "working hours."[34] The use of the term "working hours" is susceptible to the same ambiguous and overly broad interpretation of undue restriction as the term "company time." See *Essex International, supra*, and *McBride's of Naylor Road*, 229 NLRB 795 (1977). Additionally, while Everett was explaining the rule to employees, he referred to the "Welcome to Thrifty" handbook which has heretofore been found to be presumptively violative of the Act. Duhig's August 1 complaint about Watts refers to working hours. In fact, when Everett was asked what, if any, was the difference between "working hours" and "working time," he replied that it was a "matter of semantics," which clearly demonstrates his lack of understanding of the scope of permissible circumscription of protected activities. Thus, the testimony adduced by Respondent is insufficient to overcome the presumption of unlawfulness of the rule. The record fails to demonstrate that Everett or any other representative of the Company communicated the rule to its employees in such a way as to convey clearly and unambiguously an intent to permit solicitation during breaktimes or other periods when employees are not actually at work. Accordingly, I find the rule invalid on its face.

Respondent further argues that the rule was lawful for it further provided that employees "are not [to be] disturbed at your *working stations* while on the job." Additionally, it is contended that the supervisory staff repeatedly explained the rule to employees and such explanations conveyed clearly an intent to prohibit solicitations only during "working time." Even assuming, *arguendo*, that the rule, as promulgated and published, is not a *prima facie* violation of the Act, the manner in which it was applied is found to be unlawful. As stated in *Mueller Brass Co.*, 204 NLRB 617, 620 (1973):

> The Board has heretofore decided, with court approval, that an employer may not apply a no-solicitation rule, valid on its face, to forbid employees standing in line to clock out a few minutes before quitting time, as was customary at the plant, from soliciting fellow employees in the line. *Exide Alkaline Battery Division of ESB, Inc.* v. *N.L.R.B.*, 423 F.2d 663 (C.A. 4, 1970), enfg. 177 NLRB 778.

It is undisputed that the working conditions in the warehouse were at times chaotic, necessitating frequent work stoppages. During these work stoppages, employees and supervisors conversed about a variety of subjects unrelated to work. Accordingly, there is an absence of demonstration by the Company that the rule was needed to maintain discipline or production in its warehouse, or was otherwise justified.

The General Counsel also alleges that the no-solicitation/no-distribution rule was enforced in a discriminatory manner; and hence, even if it is found that there was an adequate explanation of the rule, it was inadequate to abate the coercive effect of such discriminatory application.

Everett testified that, pursuant to company policy, if it has notice that a rule has been violated, a written warning will be issued depending on the type and number of offenses. Employees are also given oral warnings. According to Everett, the Company has a system of progressive discipline.[35] In most instances, rule infractions normally result in oral counseling of an employee, except in those instances where there was gross misconduct or "a direct violation of company rules or policies." Oral counseling is utilized in those instances where the supervisor believes that the employee has a problem that can be corrected "such as attendance. First you talk to the employee and then put it in writing[36] and then probably suspend them and eventually terminate them if they don't improve."

Also, according to Everett and Malamut, the following violations result in automatic discharge: any theft, any act of dishonesty including falsification of the application for employment, gross misconduct such as gross intentional violation of a company rule, violence of any nature, and certain criminal acts. The only distinguishing factor between a gross intentional violation of a company rule warranting discharge and one warranting an oral warning is the delineation given by Everett that the "employee has a problem that can be corrected such as attendance." No other distinguishing characteristics between the various infractions were offered in evidence.

The testimony of Gaston and others that she was never informed of a company rule against talking during working time is uncontroverted. Therefore, it is concluded that the subject matter or the nature of the activity engaged in during working time, as well as the individual involved, determines to some extent the characterization of the activity as a violation of the no-solicitation/no-distribution rule. The evidence in this case fails to demonstrate that the rule was justified by a need to maintain

[34] The letter states:

> Please be advised that Ms. Jeannie Watts has been counselled for her solicitation of fellow employees during *working hours*. Solicitation of employees during *working hours* is in violation of company rules and as such a continuation of those actions by Ms. Watts will result in her discharge. [Emphasis supplied.]

[35] The handbook entitled "Welcome to Thrifty," as Everett recalls, does not contain a description of Respondent's system of progressive discipline.

[36] Everett explained that the Company has no preset number of oral counselings that require the issuance of a written warning. Additionally, there is no specified number of written warnings that leads to discharge.

discipline or production in its warehouse for admitted supervisors engaged in nonwork-related conversations and distribution of jokes during working time. See *Plastic Film Products Corp., supra*. That one of the activities Thompson engaged in could be described as charitable in nature and therefore exempt from application of the rule under Board law is an unpersuasive argument relative to motive, for Everett, after first indicating that Thompson's actions fell into a grey area, later testified that he believed they were violative of the rule. Holding this belief, Everett suggested to Thompson that the coffee can used for the collection of contributions be removed. Everett admittedly never contemplated recommending that disciplinary action be taken against Thompson and no reason was advanced for such a failure, particularly since Everett testified that the rule applied equally to supervisors and hourly employees. This failure to proscribe similar activity among employees and supervisors, cojoined with the admissions that Tarantino was a good worker and Gilbert,[37] although an unsatisfactory worker, was discharged solely for a single violation of the no-solicitation/no-distribution rule, is found to be a overreaction to the single violation of work rule which was observed by other employees and supervisors only in the breach. This "overreaction" to the violation of a work rule not shown to be enforced or needed to maintain production supports invidious motivation and is an indication of pretext. See *Neptune Water Meter Co.* v. *N.L.R.B.*, 551 F.2d 568, 570 (4th Cir. 1977); *Flowers Baking Company, Inc.*, 240 NLRB 870, 872 (1979); and *Sea-Land Service, Inc.*, 240 NLRB 1146 (1979). That Everett and Thompson disclaim knowledge of some supervisors' breaches of the Company's no-solicitation/no-distribution rule is not an exculpatory factor, for Respondent has failed to demonstrate that special circumstances obtained. See *J. S. Abercrombie Company*, 83 NLRB 524, 529 (1949), enfd. 180 F.2d 578 (5th Cir. 1950). Supervisory status is sufficient, in this case, to conclude that the actions of Rau, Mulroony, and others in similarly strategic positions translated to their subordinates the policies and desires of Respondent. See *N.L.R.B.* v. *Cities Service Oil Company*, 129 F.2d 933, 935 (2d Cir. 1942).

This finding is buttressed by the contents of the complaints regarding Gilbert's and Tarantino's activities. The complaint of Bledsoe stated that he was waiting to get past "an area in the warehouse that someone was trying to clear," he noticed Gilbert was wearing an insignia on his cap, and asked Gilbert what the insignia meant. Gilbert then allegedly stated that it was against company policy to discuss the Union, and then launched into a statement in support of the Union. Bledsoe, who admittedly initiated the conversation, was not even shown to have been warned about talking during these unscheduled hiatuses in work occasioned by blocked passageways, or at any other time, yet Gilbert was discharged for his participation in the conversation. Furthermore, Malamut's explanation for the discharge failed to demonstrate that it was necessitated by a decision that application of the progressive discipline system was determined to be futile or unwarranted based on a determination that a verbal or written warning could or would not result in future adherence to the rule.

The complaint regarding Tarantino came from one individual who claimed to have seen Tarantino distributing "union sign up card[s]" on three occasions during "business hours [n]ot on breaks or lunch]." Malamut, who "sat in" on both Gilbert's and Tarantino's discharges as well as counseling Watts, could not explain the disparity in discipline. Such inconsistency in reasons and actions are also indicative of discriminatory motive.

The warning issued to Watts centered around activity which, as in the case of Tarantino and Gilbert, was protected concerted activity not subject to limitation by an invalid no-solicitation/no-distribution rule. Even assuming that Respondent had a valid rule, the incidents involving Watts, Gilbert, and Tarantino were nothing more than conversations and activities similar to those instances of conversations or solicitations on the warehouse floor sponsored and/or condoned by Respondent's representatives for various purposes including company picnics, assisting the company baseball team, helping injured coworkers, celebrating a supervisor's birthday, the inevitable conversations that invariably occur between coworkers and employees and their supervisors during work stoppages, and the passing out of jokes or other material. Despite these varied, widespread, and indiscriminate activities described by the witnesses, it was only after the advent of the union organizing campaign and only for activities which would be protected by Section 7 of the Act that Respondent required cessation to the point of threatening and/or disciplining the violators, discharging two such sinners, and threatening the other violators with similar action.

In these circumstances, it is concluded that Respondent enforced its no-solicitation/no-distribution rule for the purpose of impeding or discouraging its employees in the exercise of their right to engage in union or other protected concerted activities; that the rule was applied in a discriminatory manner in violation of Section 8(a)(1) of the Act; and that such discriminatory application by discharging Gilbert and Tarantino and disciplining Watts is in violation of Section 8(a)(3) of the Act.

Other indicia of motive are the remarks attributed to company officials by Tarantino, Watts, and Gaston, whose accounts I find are supported by a preponderance of the evidence.

While Thompson denies discussing the distribution of authorization cards with Watts on or about June 5, he does admit seeing her, Gaston, and another employee in her van and then talking to her shortly thereafter. The subject matter of these conversations is disputed, with Thompson claiming that he offered Watts a managerial position which Watts allegedly denied because "[t]his place is all screwed up" and "her family history of union association." Watts' claim that she had applied for a managerial trainee position, which she was not given, is

[37] Respondent placed in the record evidence that Tarantino and Gilbert were offered unconditional reinstatement and appropriate backpay. Each refused orally and in writing the offer of reinstatement and accepted the backpay. The efficacy of the stipulation will be reflected in the remedy and order sections of this Decision. This stipulation was entered into by Respondent with the clear understanding that the offers of reinstatement and backpay do not constitute an admission of liability, wrongdoing, or a violation of the Act.

unrefuted. Therefore, based on admitted facts, reasonable inferences to be drawn therefrom, and inherent probabilities,[38] Watts' testimony that Thompson inquired if union authorization cards were being distributed from her van, further asked if Watts did not agree that it would be better if the Union waited a year before attempting to organize the employees, and discussed the adequacy of salaries is credited. Respondent argues that, even assuming, *arguendo*, that Thompson made some of the comments, they were merely statements of opinions about unions and did not constitute a violation of the Act. This argument is unpersuasive, for no exculpatory reasons or circumstances were presented; no assurances against reprisal were extended by Thompson to Watts during the discussion about the employees' protected concerted activity, including a short discourse on the desideratum of deferring immediate unionization. Thompson's remarks are found to be inquiries and comments of such a nature as to raise fear in the minds of employees[39] and gave the impression that he was engaging in surveillance of an employee's union activities in violation of Section 8(a)(1) of the Act.

It is also alleged that, on August 1, Malamut and McConnell told Watts that she could be discharged for engaging in solicitation for the Union. Malamut's version of the meeting was similar to Watts' testimony. As previously indicated, this threat was an unlawful enforcement of an unlawful no-solicitation rule in violation of Section 8(a)(1) of the Act. It is further alleged that the meeting conveyed the impression of surveillance. There is no evidence to support this allegation and counsel for the General Counsel concurs. Accordingly, it is recommended that the allegation that the Company's representatives gave the impression of surveillance during the August 1 meeting be dismissed.

The events that transpired during the August 21 counseling session, as described by Watts, were undisputed by Dennis, who assertedly attributed the issuance of the final warning, with the assurance she would be fired for one more mistake, to her union activities. As previously found, the disparate enforcement of the unlawful no-solicitation rule violates Section 8(a)(1) of the Act, and Dennis' attribution of unlawful motive further substantiates the preceding finding of violations of Section 8(a)(3) of the Act.

The complaint avers that, on August 27 during an employee meeting, Everett stated that he "knew who signed union authorization cards and that the signatories could be discharged for such activity," that Everett placed a general ban on all solicitation of union authorization cards. Everett's contention that he explained the Company's no-solicitation/no-distribution rule is credited inasmuch as no other employee testified that they understood his statement as Gaston recalled and that other employees would usually recall a threat of discharge for signing an authorization card and, given the confusion exhibited by Everett and other supervisors regarding the meaning of the rule, it appears most probable that Everett's comments were misunderstood by Gaston and that no such threat was actually made or implied. Accordingly, it is recommended that this allegation be dismissed.

The complaint asserts that, on August 29, Thompson asked Tarantino how many employees attended the meeting at the Nugget Casino. Thompson's general disclaimer of the allegation is not credited based upon Tarantino's demonstrated superior ability of recall, inherent probabilities, demeanor, and for the reasons hereinbefore mentioned. For the same reasons, Tarantino's version of the September 10 conversation with Thompson is also credited. Hence it is found that Thompson inquired why Tarantino was supporting the Union, and also stated that such support would result in a loss of pay and other benefits. This type of questioning "conveys an employer's displeasure with employees' union activity and thereby discourages such activity in the future . . . even when addressed to employees who have openly declared their union adherence."[40] Such inquiries are violative of Section 8(a)(1) of the Act, and such a violation is exacerbated by the accompanying threats of loss of pay and the diminution of other benefits. Such threats are also violative of Section 8(a)(1) of the Act.

Gaston's previously detailed testimony that on November 19 she was threatened with discipline for soliciting a petition "against Thrifty for Union activities" is credited. Thompson had no recollection of the conversation. According to Gaston, there was no reference to when such activity allegedly occurred. The allegation details behavior which is consistent with activities admitted by Respondent and such consistency of action further cojoined with the basis established in the above-cited cases requires crediting Gaston's testimony. As previously discussed, the threat of discipline for engaging in protected concerted activity, i.e., the alleged solicitation, under the applicable no-solicitation rule is a violation of Section 8(a)(1) of the Act for it discourages such protected concerted activity in the future.

III. OBJECTIONS TO THE ELECTION

Finally, Objection 9, which has no counterpart in the complaint, alleges that on the day before the election Everett represented that under the Union's constitution a member's property can be confiscated for nonpayment of dues. Watts' testimony is credited based on her demonstrated candor, clarity of recollection, and Everett's admission that he read portions of the constitution which refer to the dues being "legal obligations . . . enforceable in a court of law . . ." and that a question was asked about the clause, specifically inquiring if employees could lose their homes. Everett recalled announcing that it was possible that the Union could eventually get a judgment in a court of law but did not recollect discussing the enforcement of judgments, and disclaims personally using the word "confiscation." The possibility of the questioner using the term "confiscation" was not ex-

[38] See *Northridge Knitting Mills, Inc.*, 223 NLRB 230, 235 (1976); *Georgia Rug Mill*, 131 NLRB 1304 (1961); and *Gold Standard Enterprises, Inc.*, 234 NLRB 618 (1978). The standards announced in these decisions for crediting testimony are also followed throughout this Decision, and will not be repeated hereinafter.

[39] See *Regal Shoe Shops #2421 & 2340*, 249 NLRB 1210 (1980).

[40] *PPG Industries, Inc., Lexington Plant, Fiber Glass Division*, 251 NLRB 1146 (1980). Accord: *Centre Engineering, Inc.*, 253 NLRB 419 (1980).

plored and is not a matter of evidence. It is unrefuted that Everett, after reading from the union constitution, urged that the entire document be read prior to voting and then informed the employees of the election procedures and situs. He also told the employees that their vote was secret and, regardless of the outcome, they were the Company's employees, that no employee, either prounion or antiunion, had to fear any retribution.

As the Board stated in *Hollywood Ceramics Company, Inc.*, 140 NLRB 221, 223–224 (1962):

> The rule of that case is not a fixed one; it is merely one test used by the Board in determining whether the integrity of an election has been so impaired that it must be set aside. The basic policy underlying this rule, as well as the other rules in this election field, is to assure the employees full and complete freedom of choice in selecting a bargaining representative.[3] The Board seeks to maintain, as closely as possible, laboratory conditions for the exercise of this basic right of the employees.[4] One of the factors which may so disturb these conditions as to interfere with the expression of this free choice is gross misrepresentation about some material issue in the election. It is obvious that where employees cast their ballots upon the basis of a material misrepresentation, such vote cannot reflect their uninhibited desires, and they have not exercised the kind of choice envisaged by the Act. For this reason the Board has refused to certify election results where a party has misrepresented some material fact, within its special knowledge, so shortly before the election that the other party or parties do not have time to correct it, and the employees are not in a position to know the truth of the fact asserted.
>
> The Board has limited its intervention to cases of this type because an election by secret ballot, conducted under Government auspices, should not be lightly set aside, and because we realize that additional elections upset the plant routine and prevent stable labor-management relations. We are also aware that absolute precision of statement and complete honesty are not always attainable in an election campaign, nor are they expected by the employees.[5] Election campaigns are often hotly contested and feelings frequently run high. At such times a party may, in its zeal, overstate its own virtues and the vices of the other without essentially impairing "laboratory conditions."[6] Accordingly, in reaching its decision in cases where objections to elections have been filed alleging that one party misrepresented certain facts, the Board must balance the right of the employees to an untrammeled choice, and the right of the parties to wage a free and vigorous campaign with all the normal legitimate tools of electioneering.
>
> The formula used in striking this balance has been variously phrased.[7] Accordingly, we deem it appropriate to restate the rule for guidance of the parties.
>
> We believe that an election should be set aside only where there has been a misrepresentation or other similar campaign trickery, which involves a substantial departure from the truth, at a time which prevents the other party or parties from making an effective reply, so that the misrepresentation, whether deliberate or not,[8] may reasonably be expected to have a significent impact on the election. However, the mere fact that a message is inartistically or vaguely worded and subject to different interpretations will not suffice to establish such misrepresentation as would lead us to set the election aside.[9] Such ambiguities, like extravagant promises, derogatory statements about the other party, and minor distortions of some facts, frequently occur in communication between persons. But even where a misrepresentation is shown to have been substantial, the Board may still refuse to set aside the election if it finds upon consideration of all the circumstances that the statement would not be likely to have had a real impact on the election. For example, the misrepresentation might have occurred in connection with an unimportant matter so that it could only have had a *de minimis* effect. Or, it could have been so extreme as to put the employees on notice of its lack of truth under the particular circumstances so that they could not reasonably have relied on the assertion. Or, the Board may find that the employees possessed independent knowledge with which to evaluate the statements.[10]

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[3] This is contemplated by Section 1 of the Act. See also *Peerless Plywood Company*, 107 NLRB 427.

[4] See *General Shoe Corporation*, 77 NLRB 124.

[5] *Celanese Corporation of America*, 121 NRLB 303, 306.

[6] Recognizing this, we have stated that exaggeration, inaccuracies, half-truths, and name calling, though not condoned, will not be grounds for setting aside elections.

[7] See, for example, *Gummed Products Company, supra; Dartmouth Finishing Company*, 120 NLRB 262, 266; and *Celanese Corporation of America, supra* at 307.

[8] To the extent that they are incosistent with this decision, we hereby overrule those cases which suggest that the misrepresentation must have been deliberate.

[9] We are not, of course, considering in this context statements which may be reasonably construed to contain a threat of reprisal or force or promise of benefit. If the Board concludes that a statement carries such a threat or promise, it is not a defense that the message was equivocally phrased, and the election will be set aside. See *Dal-Tex Optical Company, Inc.*, 137 NLRB 1782.

[10] See, for example, *Allis-Chalmers Manufacturing Company*, 117 NLRB 744, 748; *Hook Drugs, Inc.*, 119 NLRB 1502, 1505. In evaluating the probable impact of a party's statement on the election, one factor which the Board will consider is whether the party making the statement possesses intimate knowledge of the subject matter so that the employees sought to be persuaded may be expected to attach added significance to its assertion.

See also *Modine Manufacturing Company*, 203 NLRB 527 (1973), and *General Knit of California, Inc.*, 239 NLRB 619 (1978).

There is no question that the union constitution refers to dues as "legal obligations . . . enforceable in a court of law." There is no showing by the Union that such enforcement could or would not possibly result in the reduction of such an obligation to a judgment which, in turn, could subject the debtor's property to levy and attachment. The Union has failed to demonstrate that the

Company did, in fact, make a misrepresentation, no less a material misrepresentation. The employee who asked a question on the portion of the constitution read by Everett could have used the terms that Watts and no other witness recalled. The imprecision of such statements is clearly recognized as a normal occurrence in the *Hollywood Ceramics* case, *supra*. Further, the Union has failed to show that, even assuming *arguendo* there was a technical misstatement as to the legal effect of the quoted constitutional provision, the statement involved a substantial departure from the truth which reasonably would be expected to have such a significant impact upon the voters as to warrant discarding the secret ballots of the voters. Accordingly, it is recommended that Objection 9 be overruled.

As to the objections discussed hereinbefore in conjunction with the related unfair labor practices regarding Objections 16 and 17, the maintenance of an invalid no-solicitation/no-distribution rule during the preelection period had an inhibiting effect on employees in the exercise of their Section 7 rights and therefore constituted a ground for setting aside the election. See *Sterling Faucet Company, Texas Division, a Subsidiary of Rockwell Manufacturing Company*, 203 NLRB 1031 (1973). Furthermore, the findings that the Company unlawfully interrogated and/or polled employees, as alleged in Objection 1,[41] and engaged in surveillance or created the impression of surveillance as well as threatened or otherwise unlawfully harassed and intimidated employees with discharge for engaging in concerted protected activity, as alleged in Objections 2, 3, 11, and 24, also require setting aside the election. See *Playskool Manufacturing Company*, 140 NLRB 1417, 1419 (1963); *Dal-Tex Optical Company, Inc., supra* at 1786–87; *Struksnes Construction, Inc.*, 165 NLRB 1062 (1967); and *Wall Colmonoy Corporation*, 173 NLRB 40 (1968).

Finally, the finding of unlawful discrimination against individuals prominent in the organizing campaign, as alleged in Objections 5 and 6, leads to the conclusion that Respondent has interfered with the free choice of employees in the election and, hence, the election should be invalidated. *Ponn Distributing, Inc.*, 203 NLRB 482 (1973), and *St. Vincent Hospital*, 244 NLRB 331 (1979). Accordingly, I recommend that Objections 1, 2, 3, 11, and 24, as limited hereinbefore, be sustained; that the election of November 2 be set aside; that Case 32–RC–836 be remanded to the Regional Director; and that a new election be directed by the Regional Director at an appropriate time.

CONCLUSIONS OF LAW

1. Respondent Borun Brothers, Inc., a wholly owned subsidiary of Thrifty Corporation, is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(1) of the Act by maintaining in effect an unlawful no-solicitation/no-distribution rule and reprimanding and threatening employees with discharge or other discipline if they engaged in concerted protected activity which was deemed violative of the no-solicitation/ nodistribution rule.

4. By threatening employees with reduced wages and benefits and other reprisals in the event they engaged in protected concerted activity and/or if the Union became their collective-bargaining representative; interrogating employees about their union activities, sympathies, and desires; polling employees about their desire to be represented by a union; and engaging in surveillance and/or creating the impression of surveillance of an employee's union activities, Respondent has violated Section 8(a)(1) of the Act.

5. Respondent has violated Section 8(a)(1) and (3) of the Act by discriminatorily issuing written warnings to employee Jeannie Marie Watts in an attempt to enforce the unlawful no-solicitation/no-distribution rule.

6. Respondent has violated Section 8(a)(1) and (3) of the Act by discriminatory enforcement of the no-solicitation/no-distribution rule resulting in the discharges of Robert Gilbert and Steven Tarantino.

7. By refusing to recognize and bargain with the Union as the collective-bargaining representative of its production and maintenance employees, Respondent has violated Section 8(a)(5) and (1) of the Act.

8. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

9. Allegations of the complaint that Respondent violated the Act in ways not specifically found herein have not been sustained.

10. By engaging in the aforesaid unfair labor practices, Respondent has interfered with the representation election held on November 2, 1979.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative action to remedy the unfair labor practices and to effectuate the policies of the Act.

It is recommended that Respondent be ordered to rescind its no-solicitation/no-distribution rule, expunge all material relating to violation of its no-solicitation/no-distribution rule and all written warnings, reports, or other references to any other alleged violations of its "solicitation and distribution" rules, and if, after examination, it is determined that the settlement proposed by Respondent to Gilbert and Tarantino, and accepted by these employees in part, is not adequate to make the employees whole for any losses of earnings suffered by reason of their unlawful terminations not untimely received pursuant to the aforesaid settlement offer, make them whole as set forth in *F. W. Woolworth Company*, 90 NLRB 289 (1950), with interest to be paid on any amount owing to be computed in the manner prescribed in *Florida Steel Corporation*, 231 NLRB 651 (1977). See, generally, *Isis Plumbing*

[41] As previously indicated, the record is devoid of any support for the allegation, also included in Objection 1, that the Employer permitted a third party to prescreen casuals and applicants for potential employment and, therefore, that portion of Objection 1 should be overruled.

& Heating Co., 138 NLRB 716 (1962), enforcement denied on different grounds 322 F.2d 913 (9th Cir. 1963).

Upon the basis of the foregoing findings of fact, conclusions of law, and the entire record in this proceeding and pursuant to Section 10(c) of the National Labor Relations Act, as amended, I hereby issue the following recommended:

ORDER[42]

The Respondent, Borun Brothers, Inc., a wholly owned subsidiary of Thrifty Corporation, Sparks, Nevada, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Threatening employees with reduced wages and benefits and other reprisals in the event they engaged in certain concerted protected activities or if the Union becomes their collective-bargaining representative.

(b) Interrogating and/or polling employees about their union activities, sympathies, and desires.

(c) Engaging in surveillance or creating the impression of surveillance of employees' union activities.

(d) Discriminatorily promulgating and enforcing a no-solicitation/no-distribution rule.

(e) In any other manner interfering with or attempting to restrain or coerce employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following action necessary to effectuate the purposes of the Act:

(a) Rescind its no-solicitation/no-distribution rule.

(b) Cease reprimanding or disciplining employees for violations of its no-solicitation/no-distribution rule, and discriminatorily enforcing the rule so as to unlawfully interfere in any way with its employees rights to solicit on behalf of a labor organization.

(c) Expunge from its records all material relating to violations of its no-solicitation/no-distribution rule and all written warnings.

(d) If necessary reimburse Robert Gilbert and Stephen Tarantino for any wages not yet reimbursed as a result of their discriminatory discharges in the manner detailed in the section above entitled "The Remedy."

(e) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this recommended Order.

(f) Post at its facility in Sparks, Nevada, copies of the attached notice marked "Appendix."[43] Copies of said notice, on forms provided by the Regional Director for Region 32, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(g) Notify the Regional Director for Region 32, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

IT IS FURTHER ORDERED that the complaint be dismissed insofar as it alleges Respondent violated the Act in ways not specifically found herein.

Further, based upon objections sustained hereinabove, it is recommended that the election held on November 2, 1979, be set aside and a second election by secret ballot be conducted at such time and in such manner as the Regional Director deems appropriate.

[42] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[43] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."